

November 19, 2009

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

FOR THE TENTH CIRCUIT

In re:

EARL HINES,

No. 09-1499

Movant.

ORDER

Before **TACHA, HARTZ, and O'BRIEN**, Circuit Judges.

Earl Hines, a Colorado state prisoner proceeding pro se, moves for authorization to file a second or successive application under 28 U.S.C. § 2254 for a writ of habeas corpus. We deny authorization.

In 1995, Mr. Hines was convicted of two counts of first-degree murder and sentenced to two consecutive terms of life imprisonment. While his direct criminal appeal was pending, he received a limited remand to file a post-conviction motion. After post-conviction relief was denied, his direct appeal resumed. The Colorado Court of Appeals affirmed his conviction, and the Colorado Supreme Court denied a writ of certiorari.

In January 2003, Mr. Hines filed a § 2254 habeas corpus application. The district court dismissed the action as barred by the one-year limitations period in

28 U.S.C. § 2244(d). We denied a certificate of appealability and dismissed Mr. Hines's appeal.

On June 25, 2009, Mr. Hines filed in district court a Fed. R. Civ. P. 60(b) motion to reconsider the court's denial of § 2254 relief. The court denied the motion, rejecting as meritless and untimely Mr. Hines's assertion that his § 2254 action should not have been dismissed as time-barred. Also, the court decided that Mr. Hines's assertion that he had newly discovered evidence of post-conviction counsel's failure to locate witnesses crucial to his defense was second or successive because it was a new claim challenging the validity of his conviction. After analyzing the factors set forth in *In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008) (per curiam), the court dismissed this claim for lack of jurisdiction.

In his motion for authorization, Mr. Hines asserts that he would like to raise the following claims in another § 2254 application: (1) he was denied DNA and ballistics experts, who possibly could have cleared him; (2) his post-conviction counsel was ineffective for (a) failing to obtain a DNA expert that could have cleared him after the state court in 1997 granted a motion for expert witness fees and (b) failing to obtain expert ballistics analysis; and (3) post-conviction counsel was ineffective for failing to properly investigate and locate witnesses. Mr. Hines asserts that these claims are based on newly discovered evidence.

Authorization to file a second or successive § 2254 application based on new evidence requires a showing that

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B); *see also Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005) (stating that new facts must show “a high probability of actual innocence”).

We conclude that Mr. Hines has failed to make a prima showing of newly discovered evidence. His alleged new evidence consists of a 1998 letter to post-conviction counsel from the investigator hired by counsel indicating that the investigator could not locate certain witnesses and two 1997 letters to Mr. Hines from counsel indicating counsel was trying to find appropriate DNA and ballistics experts and that the investigator would try to find witnesses. Mr. Hines either knew of or could have discovered this evidence before he filed his first § 2254 application in 2003. Further, he has failed to show that no reasonable factfinder would have found him not guilty of either count of murder. Additionally, Mr. Hines’s two ineffective assistance of post-conviction counsel arguments do not assert constitutional error. *See Coleman v. Thompson*, 501 U.S. 722, 752

(1991) (“There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” (citations omitted)).

Accordingly, we DENY Mr. Hines authorization to file a second or successive § 2254 petition. This denial of authorization is not appealable and “shall not be the subject of a petition for rehearing or for a writ of certiorari.” 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk